SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 537

J. ALVAN DAVIS, TRUSTEE,
PETITIONER

vs.

B. F. AVERY & SONS COMPANY,
RESPONDENT

PETITIONER FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

I.

Petitioner is constrained to reply to respondent's brief and to say respectfully that none of the cases cited discuss the question here involved with only two exceptions. These two cases which respondent cites, but does not quote, contain holdings directly sustaining petitioner's contention.

One of these cases is Metz v. Knobel, 21 F2d317 (2 Cir.), the pertinent holding of which is summarized in the first headnote as follows:

> "In view of Bankruptcy Act, Sec. 57g referee in bankruptcy has jurisdiction, on hearing objections to claim, to make order disallowing claim for receiving voidable preference, and may direct that claim shall be allowed on return, within specified time, of merchandise, whose transfer

constituted preference, but may not order return of property held adversely, or payment of money in lieu thereof."

This is exactly what was done in the case at bar. The Referee did not order the surrender of the preference, but merely disallowed the proof of claim unless the preference should be surrendered.

The other pertinent case cited by respondent is Thalheimer Inc. v. Florance, 58 F2d 23 (4 Cir.) wherein the court said on page 26:

> "The bankruptcy court gets jurisdiction to determine the validity of a creditor's claim, not by reason of a consent implied in the filing of a proof of a debt, but from sections 2 and 57 of the Bankruptcy Act itself, whereby it is vested with power and authority to allow or disallow a claim and to determine controversies in regard thereto."

Both of these cases expressly hold that a Referee in Bankruptcy has jurisdiction under Sections 2a and 57g of the Bankruptcy Act to hear and determine objections to the allowance of a creditor's proof of claim, and both of the holdings conflict with the decision of the Fifth Circuit in the case at bar. Moreover, it should be emphasized that the jurisdiction is not qualified, but absolute, and arises when an objectionable proof of claim is filed.

II.

Respondent has cited a good many cases to the effect that a Referee has no summary jurisdiction to compel the surrender of property adversely held by a third person. For example, the cases of Chandler v. Perry, 74 F2d 371 (5 Cir); Cline v. Kaplan 323 US 97; Fisher v. Young, 168 F2d 803 are cited. Each of these cases originated with a so called turnover order directed against a person in

adverse possession of property. The cases did not involve the jurisdiction of the Referee under 57g of the Bankruptcy Act to determine the allowability of a claim. The cited cases, therefore, have no bearing on the case at bar. Petitioning trustee has objected to the allowance of the respondent's proof of claim because of a voidable preference, as authorized by Section 47 of the Bankruptcy Act. The trustee in the case at bar has not instituted a turnover proceeding against the respondent.

Other cases cited by the respondent are Daniel v. Guaranty Trust Co., 285 US 154; Pickens v. Roy, 187 US 177; and Fitch v. Richardson, 147 F 197. None of these cases involves the Referee's jurisdiction under Section 57g of the Bankruptcy Act, and in none of the cases was the question of the allowance of a proof of claim involved.

III.

Respondent insists that it has the right of a trial by jury. The Bankruptcy Act in conferring jurisdiction on the Referee to determine objections to the allowance of a claim makes no provision for a jury trial, and such right does not exist under the Seventh Amendment. In Columbia Foundry Co. v. Lochner, 179 F2d 630 (4 Cir.), the court said on page 634:

> "The objections urged upon us by the creditor in this case were stated as strongly as might be in our decision in Alexander v. Hillman, 4 Cir., 75 F2d 451. We stressed the general policy of the federal law that a person should be subject to suit in the federal courts only where he resides, and we emphasized the view that a creditor who desires to share in the distribution of the estate of an insolvent is compelled to file a claim in the proceedings but does not thereby intend to become a party to the suit or submit to the jurisdiction of the court for all purposes; and we pointed out that in such a case he should not

be deprived of his right to a jury trial under the Seventh Amendment. We concluded that the payment of the claims filed by the creditors should be stayed until the trustee in bankruptcy should have an opportunity to sue them in their respective jurisdictions on counterclaims. But this point of view was not accepted by the Supreme Court in Alexander v. Hillman, 296 US 222.

IV.

Respondent refers to its proof of claim as "an independent and unrelated debt". Actually the claim was for a balance due under a contract after the claimant had repossessed certain property (R-25). The proof of claim was objected to on the ground that the repossession of the property was a voidable preference (R-11).

V.

We conclude that a direct and serious conflict of authority exists by reason of the decision of the Fifth Circuit, and we earnestly insist that to eliminate the resulting confusion certiorari should be granted.

Respectfully submitted

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